85-634

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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CASE NO.

in the

United States Supreme Court

October Term, 1985

ELLEN W. KIRCHNER,

Petitioner,

vs.

FRED A. KIRCHNER,

Respondent.

On Writ of Certiorari to the Florida District Court of Appeals, Third District

PETITION FOR WRIT OF CERTIORARI

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The Petitioner Ellen W. Kirchner respectfully prays that a Writ of Certiorari issue to review the decision of the Florida District Court of Appeal, Third District which affirmed the trial court's order denying Petitioner's motion to dismiss for lack of *in personam* jurisdiction.

QUESTION PRESENTED FOR REVIEW

DOES THE MERE SERVICE OF PROCESS WITHIN STATE BOUNDARIES CREATE *IN PERSONAM* JURISDICTION OVER A NON-RESIDENT DEFENDANT, OR ARE DUE PROCESS "MINIMUM CONTACTS" NECESSARY IN ALL ASSERTIONS OF STATE COURT JURISDICTION OVER NON-RESIDENTS?

Parties

The parties are Petitioner, Ellen W. Kirchner and Respondent, Fred A. Kirchner, hereafter referred to as Wife and Husband.

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THE OPINIONS OF THE COURTS BELOW

The *per curiam* opinion of the Florida District Court of Appeal, Third District, not yet reported, is included in the appendix.[1] Also included in the appendix is the unreported decision of the trial court which was affirmed by the decision presented for review.[2] The trial court's decision denied the Wife's Motion to Dismiss for lack of *in personam* jurisdiction.

JURISDICTION

This Petition presents for review a decision of the Florida District Court of Appeal, Third District which was dated and filed on July 16, 1985. This Petition was filed within ninety days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3). The finality of the decision and the fact that it constitutes a decision of the highest court of Florida in which a decision could be had are discussed in the Statement of the Case, *infra*.

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[1]See Appendix App. 1

[2]See Appendix App. 1

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Due Process Clause contained in Section One of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> U.S. CONST.
> amend. XIV, § 1.

STATEMENT OF THE CASE

1) Facts.

The underlying action in this case is a Petition for Alimony Unconnected with Dissolution of Marriage. Fred A. Kirchner ("Husband") filed the alimony petition seeking support from Ellen W. Kirchner ("Wife"). Both parties are over seventy years of age. They were married approximately eight years ago in South Carolina and lived there until Auqust of 1984. At that time, Husband abandoned his Wife and moved to South Florida. He then filed his alimony claim in Miami, Florida.

In November of 1984, after Husband had filed his alimony petition, Wife traveled to Amelia Island, Florida, a vacation and resort community adjoining Florida's northern border. She was there on an overnight visit for the purpose of driving her sick sister from South Carolina to Amelia Island. Her trip had nothing to do with her marriage. Husband heard of Wife's travel into Florida and engaged the services of "Speedy Subpoena Services" who served Wife with process when she arrived in Amelia Island. The next day Wife returned to South Carolina.

At no time during the marriage did the parties live in Florida or maintain a matrimonial domicile in Florida. Their marriage had no connection with the State of Florida.

Wife moved to dismiss the complaint for lack of *in personam* jurisdiction. Her motion to dismiss[3] and supporting memorandum of law[4] raised the claim that the Fourteenth Amendment to the United States Constitution prevents states from exercizing jurisdiction over non-residents who do not have "minimum contacts" with the forum state. In support of her motion, Wife filed an affidavit[5] negating any contact with Florida and establishing that her Husband unilaterally decided to abandon her and move to Florida. Her affidavit also

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[3]See Appendix App. 3

[4]See Appendix App. 7

[5]See Appendix App. 15

affirmed that her momentary presence in Florida had nothing to do with the marriage.

Husband never controverted these facts but simply maintained that the mere service of process in Florida is sufficient to satisfy due process and confer the courts of Florida with *in personam* jurisdiction over the Wife.

The trial court denied the Wife's Motion to Dismiss[6] and she took an interlocutory appeal to the Florida District Court of Appeal, Third District. The District Court of Appeal affirmed the trial court. The opinion read in its totality: "Per Curiam Affirmed." [7]

2) **The decision was rendered by the highest court of Florida in which a decision could be had.**

The appeal to the Florida District Court of Appeal, Third District, exhausted Wife's state court remedies. She cannot appeal the decision to the Florida Supreme Court. That court is a court of limited jurisdiction and does not have authority to review "per curiam affirmed" decisions. Fla. R. App. P. 9.030; *Nash v. Florida Indus. Comm'n.*, 389 U.S. 235, 237 n.1, 88 S. Ct. 362, 365 n.1, 19 L.Ed.2d 438, 441 n.1 (1967); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980); *Ogle v. Pepin*, 273 So.2d 391 (Fla. 1973). Moreover, a petition for writ of common law certiorari is not available in the Florida Supreme Court. *Vetrick v. Hollander*, 464 So.2d 552 (Fla. 1985). Wife has no remedy except to petition this Court.

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[6]See Appendix App. 3

[7]See Appendix App. 1

3) **The decision is final for the purpose of certiorari jurisdiction.**

Federal questions of *in personam* jurisdiction which come to the United States Supreme Court after denial of a state court interlocutory appeal are "final" for purposes of 28 U.S.C. § 1257 review. *Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1, 15 L.Ed.2d 39 (Goldberg, Circuit Justice 1965) (citing: *Local No. 438 Constr. & Gen. Laborers' Union, v. Curry*, 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514, (1963); *Mercantile Nat. Bank at Dallas v. Langdeau*, 371 U.S. 555, 83 S.Ct. 520, L.Ed.2d 523, (1963)).

In *Rosenblatt*, the defendant was served with the summons in Rome, Italy. He moved to dismiss the complaint for lack of *in personam* jurisdiction. The motion was denied by the New York trial court. Rosenblatt then took an interlocutory appeal which was denied by the intermediate appellate court and was again denied by the New York Court of Appeals. Having no further state remedy for review, he petitioned the United States Supreme Court. Upon review of a motion for a stay, Justice Goldberg held that the New York court's decision on the federal question of *in personam* jurisdiction was final. The United States Supreme Court had jurisdiction to review the case.

Moreover, this case meets the requirements for finality outlined by the Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). In that case the Court gave four categories under which a state court decision is final for purposes of 28 U.S.C. § 1257(3). This case meets both the third and fourth categories.

Category Three:

"In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."

> *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481, 95 S. Ct. 1029, 1039, 43 L.Ed.2d 328, 341 (1975).

Category Four:

"Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come."

> *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83, 95 S. Ct. 1029, 1040, 43 L. Ed.2d 328, 342 (1975).

Wife has exhausted her state court remedies. The decision is final. Wife's sole remedy is to seek the review of the United States Supreme Court. This Court has jurisdiction to review the merits of this petition.

REASONS FOR ALLOWANCE OF THE WRIT

In the case of *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) the Supreme Court made the following statement:

> "We therefore conclude that *ALL ASSERTIONS* of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." (i.e., minimum contacts with the forum state.)
>
> *Shaffer v. Heitner*, 433 U.S. 186, 212, 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683, 703 (1977) (emphasis added).

That statement is central to the Court's ruling on the issue in this case and, as will be pointed out, must be clarified.

International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) was the case which abolished the old mechanical test of territorial jurisdiction and established a new concept of jurisdiction based on fairness. Under *International Shoe*, a non-resident defendant must have:

> "certain minimun contacts with [the forum state] such that the maintenance of the suit does not

offend 'traditional notions of fair play and substantial justice.' "

International Shoe v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945).

After *Shaffer*, there was extensive commentary on the effect of the Court's ruling. Foremost in all the commentators' minds was the very question presented in this petition. Virtually all the commentators reached the same conclusion: In and of itself, mere service of process on a non-resident within the state does not create *in personam* jurisdiction.[8] Jurisdiction must be

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[8]Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 Vill. L. Rev. 38 (1979); Fyr, *Shaffer v. Heitner: The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 Emory L.J. 739 (1977); Lacy, *Personal Jurisdiction and Service of Summons After Shaffer v. Heitner*, 57 Ore. L. Rev. 505 (1978); Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 Vand. L. Rev. 1 (1984); Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 Emory L.J. 729 (1981); Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 Iowa L. Rev. 1031 (1978); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. Rev. 33 (1978); Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation of the Impact of Shaffer v. Heitner*, 1978 Wash. U.L.Q. 273 (1978); Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 Iowa L. Rev. 997 (1978); Werner, *Dropping the Other Shoe: Shaffer v. Heitner and the Demise of Presence-Oriented Jurisdiction*, 45 Brooklyn L. Rev. 565 (1979); Zammit, *Reflections on Shaffer v. Heitner*, 5 Hastings Const. L.Q. 15 (1978).

based on notions of fair play and substantial justice. The minimum contacts test applies to all assertions of state court jurisdiction.

Despite the extensive commentary, *Shaffer's* ruling that all assertions of state-court jurisdiction must be supported by "minimum contacts" has been largely ignored. No modern decisions of any of the U.S. Court's of Appeal have ruled on the issue. But, two U.S. District Court decisions have interpreted *Shaffer v. Heitner* as abandoning the out-dated principle of territorial jurisdiction. In both cases, the courts held that mere physical presence within the state was not sufficient to establish *in personam* jurisdiction:

> "After *Shaffer*, plaintiff cannot rely solely on the asserted fact of 'presence' to sustain an exercise of jurisdiction in [the forum state], for 'physical presence is no longer either necessary or *sufficient* for in personam actions.' "
>
> *Schreiber v. Allis-Chalmers Corp.*, 448 F. Supp. 1079, 1089 (D. Kan. 1978) (emphasis in original).

> "After the recent decision in *Shaffer*, the 'presence' of a non-resident in the forum is neither necessary nor *sufficient* to render constitutional the exercise of jurisdiction, whether *invoked pursuant to extra-territorial service on the non-resident or domestic service* . . . . "

Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483, 496 (D. Kan. 1978) (emphasis added).

By contrast, the state courts which have reached the issue have held that mere service of process, if occurring within the state, is sufficient to create *in personam* jurisdiction even though the non-resident defendant has no contact with the state and even though there is no relationship between the cause of action and the non-resident's momentary presence in the forum state. *See, e.g. Wolfson v. Wolfson*, 455 So.2d 577 (Fla. 4th DCA 1984); *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22 (1980); *See also Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis.2d 683, 273 N.W. 2d 285 (1979).

The decision in the instant case either conflicts with *Shaffer v. Heitner* or, the Florida courts in company with many other state courts, have wrongfully decided an important constitutional issue that needs to be settled by this Court. The importance of the constitutional issue and the need for a definitive decision are set out below.

The chilling effect on the federally created right to travel from state to state.

Every day, hundreds of thousands of American citizens exercise their constitutional prerogative to travel among the several states. They travel the length and breadth of the country and often pass through or over many states enroute to their destination. Under the practice condoned by Florida and other states, the interstate traveler can be served with process while

waiting in an airport or while flying over the forum state. Such service, the states have held, is sufficient to confer *in personam* jurisdiction even though the traveler has no prior contact with the state and his temporary presence in the forum state has nothing to do with the cause of action asserted.

Jurisdiction based solely on presence operates as an infringement on the constitutionally guaranteed right to freely travel from state to state. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). The territorial principles of the old case of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877) are inappropriate in our modern times. Today we live in a mobile society. Travel into foreign jurisdictions has become commonplace with jet aircraft and superhighways.[9]

The United States Supreme Court has eliminated *Pennoyer*-type jurisdiction based solely on service of process. In *Shaffer v. Heitner* it held:

> "It would not be fruitful for us to re-examine the facts of cases decided on the rationales of Pennoyer and Harris [*Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905)] to determine whether jurisdiction might have been sustained under the standard we adopt today.

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[9]Annually, 36 million visitors enter Florida by either automobile or aircraft. The population of Florida, based on estimates from the 1980 United States Census, is 11.5 million. If presence is sufficient for *in personam* jurisdiction, Florida has (at a minimum) just tripled the reaches of its jurisdictional power extending that power into other states and other countries. (Information obtained from The Florida State Chamber of Commerce and The Florida Department of Commerce, Division of Tourism.)

> To the extent that prior decisions are inconsistent with this standard, they are overruled."
>
> *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39, 97 S.Ct. 2569, 2584 n.39, 53 L.Ed.2d 683, 703 n.39 (1977).

If *Pennoyer* continued to be the rule, any traveler would be subjected to the jurisdiction of a number of forums with which the traveler has no relationship. A fleeting visit to a state is no basis for jurisdiction.

> "To hold such temporary visits to a State a basis for the assertion of *in personam* jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment."
>
> *Kulko v. Superior Court*, 436 U.S. 84, 93, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132, 142 (1978).

> "Would it be significantly less of a mockery if during such a 'glancing' 'temporary' presence, the defendant was served with process for unrelated claims that had *already* arisen?"
>
> Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and Abolition of the "Gotcha" Theory*, 30 Emory L.J. 729, 740 (1981).

One past case from a United States District Court illustrates the absurdity and injustice of jurisdiction based solely on presence. In the pre-*Shaffer* case of *Grace v. McArthur*, 170 F. Supp. 442 (E.D. Ark. 1959), the defendant was sued for breach of contract. The lawsuit was filed in Arkansas. The defendant was served with process on an airplane as it flew over Arkansas on a non-stop flight from Tennessee to Texas. Jurisdiction over the defendant was found to be present because at the time the defendant was handed the summons, the airplane was over the State of Arkansas.

Forum shopping.

Resolution of the issue presented by this Petition is also needed to deter the frowned upon practice of forum snopping. This case illustrates in classic form how the present state court practice unfairly condones forum shopping.

In claims for alimony, the South Carolina test is more stringent than the Florida test. *Compare* § 61.08 Fla. Stat. (1983) *and Delaney v. Delaney*, 293 S.E.2d 304, 305 (S.C. 1982). Florida is also a much more attractive forum for the Husband because it burdens the Wife with the cost of defending a lawsuit outside her state of residence. Laws pertaining to jurisdiction should not encourage such manipulative actions; the Due Process Clause prohibits it.

The facts of this case clearly illustrate the unfairness of the present practice.

In cases involving so-called "long-arm statutes," this Court has repeatedly held that the Due Process

Clause protects non-residents from litigating actions in faraway and inconvenient forums. For example, in *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980) this Court held:

> "[The Due Process Clause] protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their statues as coequal sovereigns in a federal system."
>
> *Id.* at 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490, 498 (1980).

The most recent long-arm case from this Court was decided in May of 1985. It held that a state can not assert its jurisdiction unless the defendants have:

> " 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.' "
>
> *Burger King Corp. v. Rudzewicz*, 471 U.S._____, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528, 540-41 (1985) (citing *Shaffer v. Heitner*, 433 U.S. 186, 218, 53 L.Ed.2d 683, 97 S.Ct. 2569, 2587 (1977) (Stevens, J., concurring)).

Those decisions, and others like them, insure that non-residents served pursuant to long-arm statutes are protected from litigating in states where their contacts are so minimal that the maintenance of the suit would offend traditional notions of fairplay and substantial justice. Yet, without a decision from the United States Supreme Court on this issue, there is no similar protection for non-residents who momentarily pass through states with which they otherwise have no contacts. In today's mobile society, certainty on this issue is needed.

A recent Supreme Court case clearly illustrates the need for a decision on this issue. In *Kulko v. Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978) the parties had established their matrimonial domicile in New York. The wife left her husband and moved with the children to California. There she brought suit for alimony and child support. The wife relied on the California long-arm statute and attempted to base jurisdiction on the fact that the parties were married in California and the fact that the husband had made several trips to that state. The Court held that due process prevented California from asserting *in personam* jurisdiction over the husband. It stated:

> "This single act is surely not one that a reasonable [spouse] would expect to result in the substantial financial burden and personal strain of litigating [an alimony] suit in a forum . . . miles away. [There is] no basis on which it can be said that appellant could reasonably have anticipated being 'hauled before a California court.' "

Kulko v. Superior Court, 436 U.S. 84, 97-98, 98 S.Ct. 1690, 1699-1700, 56 L.Ed.2d 132, 145 (1978).

Yet under the present state court practice, if Kulko had actually been served with process on one of his "several trips" to California, that state would have required him to defend on the merits.

If the several trips to California themselves would not give rise to *in personam* jurisdiction, should the fact that service of process occurred on one of those trips suddenly change the result? That question can and does arise often and should be answered in the negative.

The cases which developed the "minimum contacts" test applied due process principles to the exercise of long-arm jurisdiction. The issue in this case is whether those same principles apply when a non-resident defendant is personally served within the state and the cause of action has nothing to do with his presence in the forum.

The Wife in this case has less contacts with Florida than did the defending spouse in *Kulko*. The trial court sits in Miami, over 750 miles from her home, making it extremely difficult for her to defend this action. She had no warning whatsoever that going to Amelia Island would subject her to the jurisdiction of Florida in a matrimonial action. There is no rational reason why the results here should be different than in *Kulko*. Clearly when the facts and result in this case are contrasted to the facts and result in *Kulko*, it becomes apparent that the issue presented needs resolution.

CONCLUSION

This Court should accept jurisdiction to review the decision entered in this cause by the Florida District Court of Appeal, Third District.

Respectfully submitted,

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Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1985

CASE NO. 85-257

ELLEN W. KIRCHNER,

Appellant,

vs.

FRED A. KIRCHNER,

Appellee.

Opinion filed July 16, 1985.

An Appeal from a nonfinal order of the Circuit Court for Dade County, David L. Levy, Judge.

Mershon, Sawyer, Johnston, Dunwody & Cole and Charles C. Kline and S. Austin Carr and Guy Harrison, for appellant.

Frumkes and Greene and Cynthia Greene, for appellee.

Before SCHWARTZ, C.J. and NESBITT and PEARSON, Daniel S., JJ.

PER CURIAM.

Affirmed.

IN THE CIRCUIT COURT FOR DADE COUNTY, FLORIDA

CASE NO. 84-42434 CA (09)

IN RE: The Marriage Of:

FRED A. KIRCHNER,

Husband,

and

ELLEN W. KIRCHNER,

Wife.

ORDER ON WIFE'S MOTION TO DISMISS

THIS CAUSE came on to be heard before me the 8th day of January, 1985 upon the Wife's Motion to Dismiss and after hearing argument of counsel, it is

ADJUDGED that the Wife's Motion to Dismiss is denied.

ORDERED at Miami, Florida this 16 day of January, 1985.

/s/ DAVID L. LEVY
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 84-42434 CA (09)
Fla. Bar No. 137737

IN RE:
THE MARRIAGE OF
FRED A. KIRCHNER,
Petitioner/Husband

vs.

ELLEN W. KIRCHNER,
Respondent/Wife.

MOTION TO DISMISS

Respondent, ELLEN W. KIRCHNER ("Wife") moves the Court for an entry of an order dismissing the Complaint of FRED A. KIRCHNER ("Husband") for lack of *in personam* jurisdiction and in support hereof shows the Court as follows:

1. Husband has filed a petition for alimony unconnected with dissolution of marriage.

2. Husband and Wife were married in September of 1977. This was the third marriage for Husband and the second marriage for wife.

3. Husband is now seventy-four years of age and Wife is now sixty-nine years of age.

4. The marriage took place in Hilton Head, South Carolina and the parties resided there continuously from the date of the marriage until approximately August of 1984.

5. On or about August of 1984, Petitioner/Husband abandoned the wife in South Carolina and traveled to Coral Gables, Florida where he on information and belief now rents an apartment.

6. Although the Husband has been renting an apartment in Coral Gables, Florida, he voted in the November 1984 presidential election by absentee ballot in South Carolina. He maintains a valid South Carolina driver's license. He also renewed the South Carolina tag for his automobile in November of 1984, which said automobile he is now driving in Coral Gables, Florida.

7. Wife is not a resident of Florida and has not been a resident of Florida since 1937.

8. Husband and Wife did not maintain a matramonial domicile in the State of Florida.

9. Wife's only personal contact with the State of Florida was a very brief trip to Amelia Island, Florida in November of 1984. She drove down from Hilton Head, South Carolina to Amelia Island for the purpose of driving her sick sister to her sister's home in Amelia Island. When she arrived at Amelia Island, she was served with the process in this lawsuit.

10. Section 48.193(1)(e) Florida Statutes (1983) limits *in personam* jurisdiction of the circuit courts over non-resident defendants in domestic relations suits to those

cases wherein the non-resident defendant maintains a matramonial domicile within the State of Florida or resided in the State of Florida prior to the commencement of the suit.

11. Subjecting the Defendant in this case to the *in personam* jurisdiction of the courts of this State violates §48.193(1)(e) (1983); violates the Fourteenth Amendment to the United States Constitution; and violates the federally created right to travel from state to state.

WHEREFORE, Respondent/Wife, ELLEN W. KIRCHERN, respectfully prays for the entry of an Order dismissing the Complaint for lack of *in personam* jurisdiction.

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BY: /s/ CHARLES C. KLINE
Charles C. Kline

BY: /s/ S. AUSTIN CARR
S. Austin Carr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss was mailed to Melvyn B. Frumkes, Esquire, Frumkes & Greene, P.A. 100 N. Biscayne Boulevard, Suite 1607, Miami, Florida 33132 this 7th day of December, 1984.

/s/ S. AUSTIN CARR
S. Austin Carr

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 84-42434 CA (09)

Florida Bar No. 137737

IN RE:
THE MARRIAGE OF

FRED A. KIRCHNER,
Petitioner/Husband,

vs.

ELLEN W. KIRCHNER,
Respondent/Wife.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Fred A. Kirchner (Husband) has filed against Ellen W. Kirchner (Wife) a Petition for Alimony Unconnected with Disolution of Marriage. Wife has moved the court to dismiss this action for lack of *in personam* jurisdiction. She submits the following memorandum of law in support of her motion.

FACTS

The parties were married in South Carolina approximately seven (7) years ago. This was the third marriage for husband, the second for wife. On or about August of 1984 Husband abandoned his wife and traveled to Florida where upon information and belief he now resides in Coral Gables. He then brought this action. Process was served on Wife while she was in Jacksonville, Florida on an overnight visit. Her trip to Jacksonville had nothing to do with the marriage. Instead, she had driven a sick girlfriend from South Carolina to Jacksonville and stayed overnight before returning.

During their marriage, the parties lived in South Carolina and at no time maintained a matrimonial domicile nor a residence in Florida. Wife is a resident of South Carolina and has only slight contacts with the state of Florida. Her father bequeathed to her stock in a Florida utility corporation and a small property interest managed by outside concerns. In the past several years she has made brief trips to Florida to visit some family members. Wife lived in Florida as a child but has not resided here since 1937. Wife has no other contacts with Florida. Husband maintains he is a Florida Resident. But yet, he continues to register his automobile in South Carolina. And, although living in Coral Gables, voted in the recent presidential election in South Carolina.

DISCUSSION

Introduction:

This court lacks jurisdiction under the Florida long-arm statute and the due process clause of the 14th Amendment of the Unitd [sic] States Constitution. Wife has engagead [sic] in none of the activities enumerated by the Florida long-arm statute. Her contacts with Florida are insufficient to establish the minimum contacts required by due process. Furthermore, Husband's threat with a lawsuit in Florida chills Wife's free exercise of the federally created right to travel from state to state.

Mere Service of Process does not Create In Personam Jurisdiction:

Florida courts do not have jurisdiction over wife simply because she was served with process in Florida. *In personam* jurisdiction requires the complainant to satisfy a two-part test: notice, and minimum contacts between the forum state and the responding party. *Walker v. Newgent*, 583 F.2d 163 (5th Cir. 1978); *Wilkerson v. Fortuna Corp.* 554 F.2d 745 (5th Cir. 1977); *Jetco Elec. Indus., Inc., v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). Mere service of process is not enough to establish *in personam* jurisdiction. *Hodge v. Maith*. 435 So. 2d 387, (Fla. 5th DCA 1983).

In *Hodge*, a Florida resident was served in Pennsylvania where a default was entered against him awarding child support. The District Court of Appeals of Florida refused to enforce the default and held that even if notice was adequate, the lack of minimum contacts rendered the default judgment unenforceable. *Id.* at

391. Minimum contacts with the forum state are essential regardless of where the responding party is served with process.

Long-arm Statute:

Florida Statutes §48.193(1)(e) sets forth the minimum contacts which give Florida Courts *in personam* jurisdiction over non-resident respondents in suits for alimony.

Section 48.193(1)(e) states that persons doing the following are subject to the jurisdiction of Florida courts:

> "(e) With respect to proceedings for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage."

The complaint does not allege that Wife maintained a matrimonial domicile in Florida, nor that she resided in Florida. Failure to allege either entitles the moving party to dismissal for lack of *in personam* jurisdiction. *Mouzon v. Mouzon.* 9 F.L.W. 2285 (5th DCA 1984). In addition to the long-arm statute, *in personam* jurisdiction must satisfy considerations of due process.

Due Process and Minimum Contacts:

The due process clause of the XIVth Amendment of the United States Constitution demands dismissal for lack of *in personam* jurisdiction unless the defending party has at least minimum contacts with the forum state. *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S. Ct. 1690, 56 L.Ed. 2d 132 (1978); *Hanson v. Denkla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed. 2d. 1283 (1958); *International Shoe*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945).

The United States Supreme Court declined to hold a husband responsible for alimony because he lacked the minimum contacts to establish *in personam* jurisidiction. *Kulko*, 436 U.S. 84. In *Kulko*, the wife left her husband in New York and moved to California. She then commenced an action in California for divorce, award of custody and child support. She alleged *in personam* jurisdiction on the basis that the parties had been married in California and that the husband had availed himself of the benefits of the state by sending his children to California. The Court held husband's contacts with California insufficient.

Five factors must be shown to establish minimum contacts and *in personam* jurisdiction: (1) nature and quality of the contacts; (2) the quantitiy of the contacts; (3) the relationship of the cause of action to the contacts; (4) the interests of the forum state and (5) the convenience of the parties. *Sporting Goods v. Whitney*, 498 F. Supp. 1088 (N.D. Fla. 1980) ("the 4th and 5th being less important than the other three." *Id.* at 1091) The burden of showing there are sufficient contacts lies with the complaining

party. *Candy H. v. Redemption*, 563 F. Supp. at 511-12 (M.D. Ala. 1983).

The nature and quality of Wife's contacts with Florida have no connection to her marriage with Husband. Her contacts are few and sparse. It would be exteremely inconvenient for wife to come from South Carolina to litigate this matter in Florida. As a matter of law, the interest of the state must bow to considerations of due process when exercising jurisdiction over non-residents. *Hodge v. Maith. supra.*

The court in *Hodge* balanced the husband's rights of due process against the interests of the state in protecting dependent children. Principles of due process weighed more heavily and prevented enforcement of the judgment.

Kulko and *Hodge* show that Wife's contacts with Florida are insufficient for *in personam* jurisdiction and that this cause of action should be dismissed.

The Right to Travel:

It is well established that there is a constitutionally guaranteed right of freedom to travel from state to state. *Memorial Hospital v. Maricopa County*, 412 U.S. 250, 39 L.Ed.2d 306, 94 S. Ct. 1076 (1974): *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274, 92 S. Ct. 995 (1972): *United States v. Guest*, 383 U.S. 745, 16 L.Ed.2d 239, 86 S. Ct. 1170 (1966). *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164 86 L.Ed 119 (1941). If simple service of process or the long-arm statute allowed husband to threaten Wife with a lawsuit in Florida, her right to

travel here would be chilled substantially. The chill from the threat of unconstitutional use of state powers cannot be used as a deterrent to a person's desire to travel into the state of Florida.

Conclusion:

The Florida courts do not have *in personam* jurisdiction over Wife. The simple act of travelling into Florida cannot expand the jurisdictional reach of the Florida courts. Husband attempts to bestow the Florida courts with jurisdiction over Wife by coming to Florida and litigating his claim here rather than South Carolina—Wife's residence, his residence, and their matrimonial domicile. This Court has no jurisdiction over Wife and should grant her motion to dismiss for lack of *in personam* jurisdiction.

Respectfully submitted,

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Telephone (305) 358-5100

By: /s/ _____
Charles C. Kline

By: /s/ _____
S. Austin Carr

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Dismiss was hand delivered to Melvyn B. Frumkes, Esquire, Frumkes and Greene, P.A. 100 N. Biscayne Boulevard, Suite 1607, Miami, Florida 33132, this 8 day of January, 1985.

By: /s/ S. Austin Carr

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 84-42434 CA (09)

IN RE: THE MARRIAGE OF
FRED A. KIRCHNER,
Petitioner/Husband,
vs.
ELLEN W. KIRCHNER,
Respondent/Wife.

AFFIDAVIT

STATE OF TEXAS)
) ss:
COUNTY OF MONTGOMERY)

BEFORE ME, the undersigned authority, personally appeared ELLEN W. KIRCHNER, who, after being duly sworn, deposes and says:

I, ELLEN W. KIRCHNER, Respondent in the above-mentioned matter have read the Motion to Dismiss attached to this Affidavit and acknowledge that as true and correct everything stated therein.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ ELLEN W. KIRCHNER
ELLEN W. KIRCHNER

SWORN TO AND SUBSCRIBED before me this 24th day of December, 1984.

/s/ Denise Brenner
Notary Public
State of Texas

My Commission expires: 4-21-87

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 84-42434 CA (09)
Fla. Bar No. 137737

IN RE; THE MARRIAGE OF
FRED A. KIRCHNER,
Petitioner/Husband

vs.

ELLEN W. KIRCHNER,
Respondent/Wife.

MOTION TO DISMISS

Respondent, ELLEN W. KIRCHNER ("Wife") moves the Court for an entry of an order dismissing the Complaint of FRED A. KIRCHNER ("Husband") for lack of *in personam* jurisdiction and in support hereof shows the Court as follows:

1. Husband has filed a petition for alimony unconnected with dissolution of marriage.

2. Husband and Wife were married in September of 1977. This was the third marriage for Husband and the second marriage for wife.

3. Husband is now seventy-four years of age and Wife is now sixty-nine years of age.

4. The marriage took place in Hilton Head, South Carolina and the parties resided there continuously from the date of the marriage until approximately August of 1984.

5. On or about August of 1984, Petitioner/Husband abandoned the wife in South Carolina and traveled to Coral Gables, Florida where he on information and belief now rents an apartment.

6. Although the Husband has been renting an apartment in Coral Gables, Florida, he voted in the November 1984 presidential election by absentee ballot in South Carolina. He maintains a valid South Carolina driver's license. He also renewed the South Carolina tag for his automobile in November of 1984, which said automobile he is now driving in Coral Gables, Florida.

7. Wife is not a resident of Florida and has not been a resident of Florida since 1937.

8. Husband and Wife did not maintain a matramonial domicile in the State of Florida.

9. Wife's only personal contact with the State of Florida was a very brief trip to Amelia Island, Florida in November of 1984. She drove down from Hilton Head, South Carolina to Amelia Island for the purpose of driving her sick sister to her sister's home in Amelia Island. When she arrived at Amelia Island, she was served with the process in this lawsuit.

10. Section 48.193(1)(e) Florida Statutes (1983) limits *in personam* jurisdiction of the circuit courts over non-resident defendants in domestic relations suits to those

cases wherein the non-resident defendant maintains a matramonial domicile within the State of Florida or resided in the State of Florida prior to the commencement of the suit.

11. Subjecting the Defendant in this case to the *in personam* jurisdiction of the courts of this State violates §48.193(1)(e) (1983); violates the Fourteenth Amendment to the United States Constitution; and violates the federally created right to travel from state to state.

WHEREFORE, Respondent/Wife, ELLEN W. KIRCHERN, respectfully prays for the entry of an Order dismissing the Complaint for lack of *in personam* jurisdiction.

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BY: /s/ Charles C. Kline
Charles C. Kline

BY: /s/ S. Austin Carr
S. Austin Carr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss was mailed to Melvyn B. Frumkes, Esquire, Frumkes & Greene, P.A. 100 N. Biscayne Boulevard, Suite 1607, Miami, Florida 33132 this 7th day of December, 1984.

/s/ S. Austin Carr

S. Austin Carr

No. 85-634

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

ELLEN W. KIRCHNER,

Petitioner,

vs.

FRED A. KIRCHNER,

Respondent.

On Writ Of Certiorari to the Florida District Court of Appeal, Third District

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

DOES SERVICE OF PROCESS WITHIN STATE BOUNDARIES CREATE IN PERSONAM JURISDICTION OVER A NON-RESIDENT DEFENDANT OR ARE DUE PROCESS "MINIMUM CONTACTS" NECESSARY IN ALL ASSERTIONS OF STATE COURT JURISDICTION OVER NON-RESIDENTS?

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Wolfson v. Wolfson, 455 So.2d 577 (Fla. 4th DCA 1984) 2

SUMMARY OF THE ARGUMENT

The Petitioner argues that by virtue of the decision in *Shaffer v. Heitner,* "minimum contacts" are required to create in personam jurisdiction over a non-resident defendant even where the non-resident defendant was personally served with process within the forum state. *Shaffer v. Heitner,* however, dealt with "long arm" service and not with personal service within the territory of the state. Furthermore, *Shaffer v. Heitner* concluded that assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* which standards, by the express language of *International Shoe,* are applicable to service upon a defendant "if he be not present within the territory of the forum". Thus, *Shaffer v. Heitner* does not apply where, as here, the defendant is personally served within the forum state.

The Respondent respectfully submits that presence within a state, even temporary or transitory presence, is still a common law basis of state court jurisdiction unchanged by this Court's decision in *Shaffer v. Heitner.*

———o———

ARGUMENT

Service Of Process Within State Boundaries Creates In Personam Jurisdiction Over A Non-Resident Defendant

The Petitioner, ELLEN W. KIRCHNER, was personally served with process within the state of Florida. The Florida trial court and District Court of Appeal both de-

termined that such service of process was sufficient to create in personam jurisdiction. This determination is in accordance with previous Florida case law. See, e.g., *Wolfson v. Wolfson,* 455 So.2d 577 (Fla. 4th DCA 1984), "still alive and well is the traditional principle that proper service on a person found within the territory of the state effects in personam jurisdiction when the person is present voluntarily, not because of fraud or trick, and not to appear in court on an unrelated matter". ELLEN KIRCHNER now seeks review in this Court alleging, alternatively, that the Florida courts, "in company with many other state courts", have "wrongfully decided" a constitutional issue or that such decision is in conflict with *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). The Petitioner's assertions, however, are faulty in two respects. First, *Shaffer v. Heitner* involved "long arm service" upon non-resident defendants. *Shaffer v. Heitner* did not involve personal service of process upon a non-resident defendant located within the state as occurred herein. As such, there can be no conflict between this case and *Shaffer v. Heitner* because the two cases involve materially different facts. A conflict cannot arise between two cases which do not involve substantially the same controlling facts and, as was noted in *Oxmans' Erwin Meat Co. v. Blacketer,* 86 Wis. 2d 683, 273 N.W.2d 285 (1979):

> Neither *International Shoe* nor its progeny, including the recent case of *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), addresses the issue of the constitutionality of the state's exercising jurisdiction based solely on the service of process upon an individual physically present within state borders.
>
> *Oxmans' Erwin Meat Co. v. Blacketer,* 86 Wis. 2d 683, 685, 273 N.W.2d 285, 287 (1979).

Second, the Florida courts have not "wrongfully decided a constitutional issue" because the decision of this Court in *Shaffer v. Heitner* clearly indicates that personal service upon a non-resident defendant within a state continues to create in personam jurisdiction over the defendant.

In *Shaffer v. Heitner* this Court stated:

> We therefore conclude that all assertions of state court jurisdiction must be evaluated *according to the standards set forth in International Shoe and its progeny.*
>
> *Shaffer v. Heitner,* 433 U.S. 186, 212, 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683, 703 (1977) (Emphasis added).

The "standards set forth in *International Shoe*" are:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, *if he be not present within the territory of the forum,* he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice".
>
> *International Shoe Co. v. State of Washington,* 326 U.S. 310, 314, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (Emphasis added).

It is, therefore, clear that the "all assertions of state court jurisdiction" language in *Shaffer v. Heitner* applies only to assertions of state court jurisdiction in which "long arm" or substituted service is attempted and not to assertions of state court jurisdiction where the defendant is personally served with process while voluntarily present within the territory of the forum.

Presence within a state, even temporary or transitory presence, is still a common law basis instilling competence in the courts of that state to adjudicate claims against the person. See, e.g., *Leab v. Streit,* 584 F.Supp. 748 (S.D. N.Y. 1984). In *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) this Court made the following statement:

> Personal service of written notice within the jurisdiction is the classic form of notice *always* adequate in any type of proceeding.
>
> *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) (Emphasis added).

It has long been the law that personal service within a state's geographical area establishes its court's personal jurisdiction over the defendant. *Shaffer v. Heitner* does not change this well established basis of jurisdiction. The cases relied upon by the Petitioner in discussing "fairness" and "due process" are directed either to the fairness of the basis for *substituted service* when an individual was *not* personally served or present within the area, or to the fairness of subjecting a foreign corporation to the jurisdiction of the court. See, e.g., *Donald Manter Company, Inc. v. Davis,* 543 F.2d 419 (1st Cir. 1976); *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 1283 (1958); *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). Further, in the only post-*Shaffer* case in which a court had the opportunity to determine the application of *Shaffer v. Heitner* to a case involving personal service within the forum, the court declined to so do:

> In our view the United States Supreme Court has not imposed a "minimum contacts" requirement on a state's assertion of jurisdiction over a natural person

upon whom personal service within the state has been achieved.

Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis.2d 683, 685, 273 N.W. 2d 285, 287 (1979).

CONCLUSION

The Respondent respectfully submits that the Petitioner has failed to show a conflict between the decision herein and this Court's decision in *Shaffer v. Heitner* inasmuch as the two cases are substantially factually dissimilar and, therefore, it cannot be said that any particular rule of law enunciated in *Shaffer v. Heitner* applies under the distinctively different factual circumstances herein. Further, it also cannot be said that the Florida courts have "wrongfully decided an important constitutional issue" because this Court did not impose the *Shaffer v. Heitner* "minimum contacts" requirement upon a state's assertion of jurisdiction over a person personally served within the state.

WHEREFORE, the Respondent respectfully requests that the Supreme Court of the United States deny the Petition for Certiorari.

Respectfully submitted,

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